87-1823

No.



IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1987**

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

*Petitioners,*

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Question Presented

Whether the Second Circuit erred in holding, contrary to the rule in other Circuits, that *every* interlocutory order which dismisses on the merits a claim which includes a request for permanent injunctive relief is automatically subject to immediate appeal under 28 U.S.C. § 1292(a)(1) (1982)?

## Rule 28.1 Statement

Petitioner Men's International Professional Tennis Council is an unincorporated association comprised of representatives of three organizations, none of which is publicly owned. Petitioners M. Marshall Happer III and Philippe Chatrier are individuals.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Men's International Professional Tennis Council ("MIPTC"), M. Marshall Happer III and Philippe Chatrier, defendants below,[1] respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered on February 8, 1988, which denied petitioners' motion to dismiss the appeals on jurisdictional grounds. The appeals, noticed by respondents Volvo North America Corporation ("Volvo"), International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ"), plaintiffs and counterclaim defendants below, sought partial review of an interlocutory order dismissing certain claims in the First Amended Complaint (the "Complaint").

[1] Petitioners MIPTC and Happer are also counterclaimants below against each of the respondents and against additional counterclaim defendants.

The Second Circuit refused to dismiss the appeals although: (1) the district court's August 10, 1987 Memorandum and Order (the "Order") of dismissal was interlocutory because counterclaims were pending; (2) one of the appellants, Volvo, was not seeking to appeal the entire Order of the district court which had dismissed certain of its claims without prejudice, but only so much of that Order as dismissed certain of Volvo's other claims with prejudice; (3) the dismissed Complaint did not request preliminary injnctive relief; and (4) in the two years between the filing of the Complaint and its dismissal, none of the respondents had ever moved for any interim relief.

Instead, the Second Circuit interpreted this Court's decision in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), to hold that the mere fact that a dismissed complaint requested *permanent* injunctive relief, *by itself*, presents a "serious, perhaps irreparable, consequence" that can only be "effectually challenged" by immediate appeal. That interpretation of *Carson* placed the Second Circuit in direct conflict with other circuit courts of appeals which have, petitioners respectfully submit, properly interpreted this Court's holding in *Carson*.

## Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 839 F.2d 69 and is reproduced at the appendix hereto.

## Jurisdiction

The decision of the Second Circuit was entered on February 8, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

## Statutory Provision Involved

Section 1292(a)(1) of Title 28 of the United States Code provides in pertinent part:

> "(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

## Statement of the Case

Petitioner MIPTC is a not-for-profit association which organizes, schedules and administers a circuit of men's professional tennis events known as the "Grand Prix." On April 17, 1985, respondent Volvo, a distributor of automobiles which owns, produces and sponsors certain men's professional tennis events, brought an action against MIPTC, M. Marshall Happer III, its Administrator, and Philippe Chatrier, its then-Chairman. Volvo's initial complaint contained claims arising under sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1, *et seq.* (1982), and under state law. The initial complaint explicitly requested preliminary as well as permanent injunctive relief, although Volvo never moved for any interim relief based upon the claims of its initial complaint.

Petitioners moved to dismiss Volvo's complaint, but that motion was never decided because Volvo served the First

Amended Complaint dated July 3, 1985 (the "Complaint"). The amended pleading *dropped* the initial complaint's request for preliminary injunctive relief. Joining Volvo as plaintiffs below were IMC and ProServ, two sports management firms or "player-agents," organizations which, *inter alia,* represent and manage men's professional tennis players and are present in virtually every aspect of men's professional tennis. In the Complaint all three respondents alleged violations of sections 1 and 2 of the Sherman Act as well as interference with prospective business relationships and unfair competition. Volvo additionally alleged defamation, product disparagement, breach of contract and fraud.

The Complaint's prayer for relief sought compensatory, punitive and treble damages, declaratory and injunctive relief, interest, costs and attorneys' fees. The Complaint did *not* pray for relief *pendente lite.*

Petitioners filed a motion to dismiss the Complaint on September 13, 1985. Petitioners MIPTC and Happer also filed counterclaims against respondents and additional counterclaim defendants on November 6, 1985.[2] Those counterclaims are still pending.

Discovery began by way of interrogatories and document production. Hundreds of thousands of pages of documents were exchanged.

In 1985, none of the respondents moved for a preliminary injunction or temporary restraining order against any of the petitioners. In 1986, none of the respondents moved for a preliminary injunction or temporary restraining order against any of the petitioners. In 1987, none of the respond-

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[2] Respondents moved to dismiss the counterclaims and that motion has not been decided by the district court.

ents moved for a preliminary injunction or temporary restraining order against any of the petitioners.

On August 10, 1987, the district court, per Hon. Kevin Thomas Duffy, entered an Order granting petitioners' motion to dismiss the Complaint. The district court's Order did not address respondents' entitlement to injunctive relief or engage in any balancing of hardships and equities. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court dismissed the claims which were raised by all three respondents for failure to state a claim upon which relief can be granted. Those claims—federal antitrust law violations, tortious interference with prospective business relationships and unfair competition—were all dismissed with prejudice. Volvo's individual state law claims, however, were dismissed with leave to replead.[3]

Notices of appeal were filed by Volvo and ProServ on September 8, 1987 and by IMC on September 9, 1987. Volvo claimed that it had not abandoned its right to seek to replead certain of its state law claims but intended to replead them following disposition of the appeal concerning its other claims by the appellate court.

None of the respondents claimed that the district court's Order was final. None had obtained certification of that Order pursuant to 28 U.S.C. § 1292(b) (1982), and judgment was not entered by the district court pursuant to Rule

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[3] The district court dismissed without prejudice Volvo's defamation and product disparagement claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Volvo's fraud claim was dismissed without prejudice for lack of particularity as required by Fed. R. Civ. P. 9(b). Volvo's breach of contract claim was dismissed without prejudice for lack of jurisdiction: Volvo had not pled diversity jurisdiction but only pendent jurisdiction as a basis for its state law claims, and all federal law claims had been dismissed with prejudice.

54(b) of the Federal Rules of Civil Procedure.[4] Rather, respondents asserted that the non-final Order was appealable as of right pursuant to 28 U.S.C. § 1292(a)(1) (1982), as the refusal of an injunction.

On October 20, 1987, petitioners made a motion in the United States Court of Appeals for the Second Circuit for dismissal of the appeals. Petitioners argued that the Order was nonappealable under this Court's decision in *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), because (1) it did not constitute the refusal of an injunction; (2) given respondents' failure to seek a preliminary injunction in over two years, the unavailability of immediate appeal would not cause them any harm, much less *serious* harm; and (3) the interlocutory Order could be effectively challenged following entry of judgment on the remaining claims in the action.

Respondents, in opposition to the motion to dismiss their appeals, introduced through the affidavits of attorneys and others new factual allegations which were not part of the record before the district court. These affidavits chiefly concerned anticompetitive conduct not addressed in the Complaint but allegedly engaged in by petitioners after the Complaint was filed and before the district court entered its Order. Neither the conduct alleged in the Complaint nor the conduct referred to in respondents' affidavits, however, was ever the subject of any request to the district court for relief *pendente lite*. Moreover, respondents never sought leave from the district court to amend their Complaint to include any of the allegedly anticompetitive conduct occurring after the Complaint was filed.

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[4] Respondents made an oral request of the district court for Rule 54(b) certification *after* they filed notices of appeal. That request was denied. *See* n.10, *infra*.

On February 8, 1988, the Second Circuit entered an order denying the motion to dismiss the appeals.[5] The Second Circuit, per Hon. Daniel J. Mahoney, agreed with petitioners that the district court's Order did not actually constitute the refusal of an injunction but merely had the practical effect of refusing an injunction, thus rendering controlling this Court's decision in *Carson, supra.* The Second Circuit, however, then interpreted *Carson* in a manner which placed it in direct conflict with other circuit courts of appeals.

On March 8, 1988, petitioners made a motion in the Second Circuit to have the appeals held in abeyance pending petition for a writ of certiorari to this Court. On March 16, 1988, that motion was denied. Thus, the appeals were fully briefed and are set for argument on May 9, 1988.

## Reasons for Granting the Writ

Petitioners respectfully submit that the Court should grant this writ to resolve a conflict which exists among the circuits on a significant question of appellate jurisdiction. In *Carson* v. *American Brands, Inc.,* 450 U.S. 79 (1981), this Court set forth a standard for determining when appellate jurisdiction exists to review orders which do not actually refuse injunctions but have the "practical effect" of refusing injunctions. Since then, as the Second Circuit noted in its opinion, "*Carson* has spawned an array of circuit court opin-

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[5] The Second Circuit indicated that it was denying petitioners' motion to dismiss with respect to the antitrust claims of all three respondents and with respect to Volvo's state law claims of interference with prospective business relationships and unfair competition. The Second Circuit also indicated that it was granting petitioners' motion to dismiss with respect to Volvo's other state law claims. Volvo, however, had not sought to appeal those remaining state law claims.

ions which have attempted to cope with its implications." *Volvo North America Corp.* v. *Men's International Professional Tennis Council,* 839 F.2d 69, 73 (2d Cir. 1988). *See also Sims Varner & Assoc., Inc.* v. *Blanchard,* 794 F.2d 1123, 1126-27 & n.6 (6th Cir. 1986) (noting a conflict among circuits but declining to resolve the issue). The Second Circuit's application of *Carson* in this case, although consistent with the rule of the District of Columbia Circuit,[6] is in conflict with the decisions of three other circuit courts and has added to the confusion which exists on this important issue.[7]

In this case, the Second Circuit ruled that under the *Carson* test the mere dismissal on the merits of a claim which seeks ultimate injunctive relief, without any special showing of probable injury, suffices to invoke appellate review of a non-final order under section 1292(a)(1). The Second Circuit thus rejected the considered holdings of the First, Third and Federal Circuits. Those courts have interpreted *Carson* to mean that where a complaint is dismissed on other grounds, the mere fact that the complaint included a request for permanent injunctive relief does not, without more, establish the presence of serious, irreparable harm

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[6] *See Center for National Security Studies* v. *CIA*, 711 F.2d 409, 412 (D.C. Cir. 1983) (interlocutory appeal allowed from order having the practical effect of denying an injunction, regardless of whether serious, irreparable harm was shown, where order involved a ruling on the merits).

[7] Moreover, internal conflicts exist within two other circuits respecting the proper interpretation of *Carson. See Brown* v. *Kerr-McGee Chemical Corp.,* 767 F.2d 1234, 1238-40 (7th Cir. 1985), *cert. denied,* 475 U.S. 1066 (1986) (acknowledging inconsistent decisions within the Seventh Circuit); *compare Shanks* v. *City of Dallas,* 752 F.2d 1092, 1096 (5th Cir. 1985) *and Gould* v. *Control Laser Corp.,* 650 F.2d 617, 621 (5th Cir. 1981) *with Commodity Futures Trading Commission* v. *Preferred Capital Investment Co.,* 664 F.2d 1316, 1319-21 (5th Cir. 1982).

justifying immediate appeal. *See Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987) (en banc); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 17-18 (1st Cir. 1981).

Furthermore, until this Court resolves the conflict among the circuits over the proper application of *Carson*, it will be possible in some courts, such as the Second and District of Columbia Circuits, to circumvent the clear Congressional policy favoring finality prior to review. The Second Circuit rule permits every litigant, merely by inserting into its pleading a request for permanent injunctive relief, to ensure that, if dismissed, its claims will obtain immediate interlocutory review. As a result, piecemeal review will become the norm instead of an unusual measure taken only in extraordinary circumstances, and the caseload of the appellate courts may increase dramatically.

**This Court Should Grant Certiorari to Resolve the Conflict Among the Circuits As to Whether Interlocutory Appellate Jurisdiction Is Available to Review Every Non-Final Order Dismissing a Claim Which Requests Permanent Injunctive Relief, Regardless of Whether Special Harm Is Shown**

Section 1292(a)(1) carves out an exception to the final judgment rule by permitting review of interlocutory orders by a district court "granting, continuing, modifying, refusing or dissolving injunctions." This Court has interpreted section 1292(a)(1) to apply in addition to "orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, — U.S. —,

108 S. Ct. 1133, 1143 (1988) (quoting *Carson* v. *American Brands, Inc.*, 450 U.S. at 84).

In *Carson,* the Court set forth the following test for evaluating the appealability of *de facto* injunctive orders:

> For an interlocutory order to be immediately appealable under § 1292(a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because § 1292 (a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly. . . . Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

450 U.S. at 84. This limitation on interlocutory review embodies the Court's view of "the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. . . . Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 181 (1955) (citation omitted).

The Second Circuit's decision here rejects this Court's limitations on appellate jurisdiction and conflicts with those circuits which have followed *Carson's* teachings.

### A. The Second Circuit's Decision in This Case Rests Upon a Misreading of *Carson* and a Disregard of Respondents' Failure to Seek Preliminary Injunctive Relief

The Second Circuit effectively held that the very dismissal of a claim which seeks ultimate injunctive relief satisfies the *Carson* test. *Volvo*, 839 F.2d at 75-76. Thus, in the Second Circuit, *every* order which has the "practical effect" of denying an injunction would be automatically appealable as of right. *Id.* This, petitioners submit, constitutes a serious misreading of *Carson*.

The Second Circuit found that the dismissal of respondents' claims had the "practical effect" of refusing an injunction. *Id.* at 73. The Second Circuit also found that, despite the fact that in over two years of litigating respondents never requested preliminary injunctive relief, the order dismissing their claim had "serious, perhaps irreparable consequence[s]" that could be "effectually challenged" only by immediate appeal. *Id.*

The Second Circuit reached this result by construing *Carson* to have kept intact the broad reading which lower courts had given to *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932), despite the fact that *Carson* has narrowed the application of *General Electric*. As one circuit court has explained, "While . . . the *Carson* Court did not overrule *General Electric*, a court need not overrule a prior case in order to clarify that case by stating a requirement which was met but not discussed. A court may refine holdings in its precedent which were stated or have been interpreted too broadly." *Woodard* v. *Sage Products, Inc.*, 818 F.2d at 851.

In *General Electric*, the Court held that the dismissal of a counterclaim requesting injunctive relief amounted to the

appealable refusal of an injunction because the decision resolved "the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. . . . And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction." 287 U.S. at 433. In *Carson*, the Court explained that its holding in *General Electric* was based upon the existence of a "serious, perhaps irreparable, consequence" to the counterclaim defendants if immediate appeal were denied. 450 U.S. at 86 n.11.

The Court in *Carson* also explained its holding in another decision on interlocutory appellate jurisdiction, *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966). There, the Court had held that the denial of the plaintiff's motion for summary judgment on claims seeking ultimate permanent injunctive relief was not appealable as an interlocutory denial of an injunction because it "does not settle or even tentatively decide anything about the merits of the claim. It is simply a pretrial order that decides only one thing—that the case should go to trial." 385 U.S. at 25. The *Carson* decision explained that the Court in *Switzerland Cheese* rejected interlocutory appellate jurisdiction because "[t]he motion for summary judgment sought permanent and not preliminary injunctive relief and petitioners did not argue that a denial of summary judgment would cause them irreparable harm *pendente lite*," and because "permanent injunctive relief might have been obtained after trial." 450 U.S. at 85.

Thus, in *Carson* the Court clarified its earlier decisions which had been given an overly expansive interpretation that the Second Circuit continues to apply. The *Carson* decision reiterated that interlocutory appellate jurisdiction

will lie only in very special circumstances—where a litigant can show that an order not only has the "practical effect" of denying a claim for injunctive relief, but also causes the litigant serious, irreparable injury which cannot be effectively challenged by review later in the litigation.

The Second Circuit failed to consider that *Carson* harmonized prior decisions of this Court to emphasize the need for a special showing of irreparable harm *pendente lite*. Instead, the Second Circuit retreated to earlier interpretations of *General Electric* and based interlocutory review here on the bare fact that the district court's Order "entirely disposed of the [respondents'] prayer for injunctive relief." *Volvo,* 839 F.2d at 75. The Second Circuit's opinion states:

> The dismissal of the antitrust counts of [respondents'] amended complaint without leave to replead decided that, in *Carson's* words (quoting *General Electric*), "upon the facts alleged [in their amended complaint, respondents] were not entitled to an injunction," and "resolved the very question that, among others, would have been presented to the courts upon formal application for an interlocutory injunction." Or as *Gardner* [v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)] put it, "[t]he order . . . entirely disposed of the [respondents'] prayer for injunctive relief." Accordingly, the irreparable harm which *Carson* found in *General Electric* is present here.

*Volvo,* 839 F.2d at 75-76. This holding—that respondents were entitled to interlocutory relief solely because their prayer for injunctive relief was dismissed—is in direct conflict with *Carson* and the rule of other circuits. *See* Point I, B, *infra.*

If the Second Circuit had properly interpreted *Carson* to require more than the effective denial of an injunction, the record developed in the district court should have compelled the court to dismiss the appeals.[8] The record demonstrated that (1) respondents failed to request preliminary injunctive relief in their Complaint, (2) in two years of litigation before their Complaint was dismissed, none of the respondents moved for a preliminary injunction against any of the petitioners, and (3) respondents have never made any effort to seek expedited treatment of their appeals to redress the allegedly "immediate" harm. By placing little or no weight on respondents' failure to pursue preliminary injunctive relief, the Second Circuit disregarded this Court's discussion of *Switzerland Cheese* in *Carson* which indicated that the denial of permanent injunctive relief does not present the need for interlocutory review presented by the denial of preliminary injunctive relief. 450 U.S. at 85-86.

The Second Circuit also refused to follow numerous other decisions which have similarly placed great emphasis on a party's failure to seek preliminary injunctive relief prior to the appeal and have stated that orders refusing requests for *permanent* injunctions do not threaten the type of injury that justifies immediate review. *See, e.g., Woodard* v.

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[8] Although it gave little consideration to the record of two years of litigation in the district court, the Second Circuit did give some consideration to respondents' supplementation of the record on appeal through the submission of affidavits in response to the motion to dismiss the appeals. In *dicta*, the court of appeals stated that such affidavits served to "fortify" its conclusion that interlocutory appeal was proper because claims for permanent injunctive relief had been dismissed. *See Volvo*, 839 F.2d at 76. Factual arguments on harm should not be resolved on appeal by affidavits, however, especially when those affidavits incorporate new factual material that was not presented to the district court and was never made the subject of a request or motion to amend the Complaint. *See Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 854 (Fed. Cir. 1987) (en banc).

*Sage Products, Inc.*, 818 F.2d 841, 851 (Fed. Cir. 1987) (en banc); *Shanks* v. *City of Dallas*, 752 F.2d 1092, 1097 n.6 (5th Cir. 1985); *South Bend Consumers Club, Inc.* v. *United States Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984); *Commodity Futures Trading Commission* v. *Preferred Capital Investment Co.*, 664 F.2d 1316, 1319 n.4 (5th Cir. 1982); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 476 (3rd Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 18 (1st Cir. 1981); *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 170 (5th Cir. 1981).

In sum, by effectively eliminating the irreparable harm requirement for interlocutory review of orders which have the "practical effect" of refusing injunctions, the Second Circuit has expanded its jurisdictional reach at the expense of the orderly and efficient functioning of the district courts. Claimants will no longer be bound by the district court's determination of whether an interlocutory dismissal should be immediately appealed. Instead, they can ensure appellate jurisdiction by inserting in questionable claims a perfunctory request for permanent injunctive relief. The Second Circuit's drastic reinterpretation of section 1292(a)(1) and rejection of the express Congressional preference for finality prior to review should be passed upon by this Court.

**B. The Federal, First and Third Circuits' Decisions Properly Interpreted This Court's Holding in *Carson* to Prohibit Interlocutory Review Absent Serious, Irreparable Harm *Pendente Lite***

Three circuit courts have reached the conclusion opposite to that reached by the Second Circuit and have declined to extend appellate jurisdiction to interlocutory orders which merely dismiss claims that include a request for permanent injunctive relief. *See Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852 (Fed. Cir. 1987) (en banc); *Shirey* v.

*Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 19 (1st Cir. 1981).

In *Woodard*, appeal was taken from a district court grant of summary judgment in favor of one of several defendants in a patent infringement action. The Federal Circuit sitting *en banc* held that, although the grant of summary judgment effectively denied permanent injunctive relief, it was not immediately appealable in the absence of some serious, irreparable consequence that could not be effectually challenged on appeal of a final judgment. The court interpreted *Carson* to apply to "all deemed injunctive orders," even those dismissing a claim for injunctive relief on the merits. *See* 818 F.2d at 851. The Federal Circuit found significant the factual context of the *Carson* decision, in which this Court permitted immediate review of the interlocutory refusal of a permanent injunction only after finding that irreparable harm would flow from the lost opportunity to execute a settlement agreement conditioned on the avoidance of a trial. *See id.* at 849.

Unlike the Second Circuit, the Federal Circuit recognized that this Court in *Carson* "went to great lengths to analyze its prior decisions and to fit them into the *Carson* analysis." *Id.* at 849. Hence, the Federal Circuit recognized that the Court's 1932 decision in *General Electric* no longer supports the proposition that every interlocutory order dismissing a complaint which requests permanent injunctive relief is immediately appealable as of right. Indeed, the Federal Circuit suggested that the *General Electric* decision *never* stood for that proposition:

> The *General Electric* Court did not hold that every order which entirely disposes of a claim for a permanent injunction is immediately appealable as of

> right. There, the appealed order was deemed one that denied a *preliminary* injunction, not a *permanent* injunction. . . . As with the specific denial of preliminary injunctive relief, the harm caused by an order which is deemed to deny a preliminary injunction cannot *effectually* be reviewed after the trial. By that time the question of relief or of maintaining the *status quo during* trial will have become moot. The denial of a *permanent* injunction does not necessarily have this element of harm, that is, effectual unreviewability after trial.

818 F.2d at 851 (emphasis in original). Thus, the Federal Circuit put the appellant in *Woodard* to the task of demonstrating the element of harm *pendente lite*. Because no adequate showing was made, the appeal was dismissed.

Significantly, like respondents here, the appellant in *Woodard* sought improperly to introduce on the motion to dismiss the appeal allegations of harm that were never put before the district court. The Federal Circuit refused to resolve the issue of irreparable harm in the first instance, instructing litigants that harm must be apparent from the record developed below and directing them to make use of the Rule 54(b) process where necessary to develop such a record. 818 F.2d at 854. The ruling stands in direct conflict to the Second Circuit's implicit result in *dicta* that it was entitled to refer to disputed factual affidavits in assessing serious, irreparable harm.

The Third Circuit has read *Carson* similarly. In *Shirey* v. *Bensalem Township*, one of four plaintiffs in a civil rights action appealed from an order dismissing the complaint, rather than amending his pleading as did his co-plaintiffs. The appellant argued that because the dismissed claim included a request for permanent injunctive relief, it was immediately appealable as of right under section

1292(a)(1). The Third Circuit rejected this argument and, applying *Carson's* serious, irreparable harm test, dismissed the appeal. *See* 663 F.2d at 475.

Noting that the "primary use [of section 1292(a)(1)] has been for appellate review of decisions on *preliminary* injunctions," *id.* at 476 (emphasis added), the Third Circuit found that the appellant's failure to seek a preliminary injunction or other interlocutory relief throughout the lawsuit refuted his allegations of harm:

> The party's own evaluation that there is no need for injunctive relief *pendente lite* is a good indication that the status quo can continue until the ultimate conclusion of the litigation without interlocutory appellate review. Thus, one of the factors which the Court has considered significant in determining whether the order falls within the class of "interlocutory" orders to which § 1292(a)(1) applies is whether the party has sought preliminary injunctive relief.

*Id.* (citing *Carson*, 450 U.S. at 89; *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 479 (1978)). By contrast, the Second Circuit in the present case gave virtually no weight to respondents' complacency during the two years between the filing of the Complaint and its dismissal.[9]

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[9] Respondents argued on the motion to dismiss in the Second Circuit that preliminary injunctive relief had been unnecessary because petitioners' conduct was restrained by the mere filing of the Complaint. Since the Complaint was dismissed on August 10, 1987, however, petitioners have been under no such restraint, and respondents have complained to the Second Circuit that petitioners have taken allegedly anticompetitive actions that were previously only threatened. Despite this, respondents have never even requested expedited treatment of their appeals and actually requested an extension of time to file their appellate briefs, thus demonstrating their continued complacency and refuting their protestations of immediate, irreparable harm.

The Third Circuit also concluded that because the district court's order in *Shirey* was not based on a "traditional balancing of the hardships and equities characteristic of a ruling on injunctive relief," it would be "exalting form over substance" to treat the order as one denying injunctive relief. 663 F.2d at 477. Recommending the use of Rule 54(b) and section 1292(b) for interlocutory appellate consideration of "limited issues," the Third Circuit admonished litigants that "Congress did not contemplate that § 1292(a)(1) would be utilized as a generally available route to interlocutory appeals merely because the complaint happens to request injunctive relief." *Id.* at 478. The Second Circuit has disregarded this clear Congressional intent and has permitted litigants to engage in just such a manipulation of the procedural rules governing appellate jurisdiction.

Finally, the First Circuit is in agreement with the Third and Federal Circuits' interpretation of *Carson*. In *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, the plaintiffs appealed an interlocutory order striking, on the merits, a request in a complaint preliminarily and permanently to enjoin the defendant from operating a nuclear power plant. In dismissing the appeal, the First Circuit noted that a preliminary injunction had been denied to the plaintiffs a year and a half before, and that they did not appeal from that earlier order, seek reconsideration of the issue, or renew their request for an interlocutory injunction. *See* 655 F.2d at 17-18. Because preliminary relief, as opposed to final injunctive relief, had become "a dead issue" in *Plymouth*, the First Circuit concluded:

> Under the circumstances, we think plaintiffs are hard pressed to demonstrate that the instant order has any *immediate* consequences of a serious nature, or that they will suffer "irreparable harm" pending

> final disposition of the case in the district court. . . . To be sure, the district court may have "finally" determined the "legal sufficiency" of plaintiffs claims for injunctive relief. . . . Even so, its order has the "practical effect" only of denying *permanent* injunctive relief, and as such may be "effectively challenged" on appeal from final judgment. Such an order, we think, is, despite whatever aspects of "finality" it may possess, immediately appealable only pursuant to Fed.R.Civ.P. 54(b) or 28 U.S.C. § 1292(b).

*Id.* at 18 (emphasis in original) (citations and footnotes omitted).

The well-considered decisions of the Federal, Third and First Circuit Courts of Appeals squarely conflict with the opinion of the Second Circuit. Only this Court can resolve that conflict. Thus, petitioners' writ should be granted.

**C. The Second Circuit's Decision Conflicts With the Clear Congressional Policy Against Piecemeal Review and Circumvents the Rule 54(b) Procedure.**

The Second Circuit's unsupported expansion of its jurisdiction to review interlocutory orders directly conflicts with the Congressional policy, codified at 28 U.S.C. § 1291 (1982), that the jurisdiction of the courts of appeals be limited to review of final judgments. It also circumvents the procedure established by Rule 54(b) which calls for any record on imminent harm justifying interlocutory review to be developed in the district court.

The final judgment rule has been a basic principle of our jurisprudence since the Judiciary Act of 1789, 1 Stat. 73, 84. In *McLish* v. *Roff*, 141 U.S. 661, 665-66 (1891), the Court identified the following reasons for this policy:

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

Thus, the final judgment rule prefers the prospect of a retrial following appeal to piecemeal interlocutory review.

In 1891, Congress created the first exception to the rule of finality with the creation of the circuit courts of appeals. As observed in *Baltimore Contractors, Inc.* v. *Bodinger*, this exception

> allowed appeals from interlocutory orders in equity "granting or continuing" injunctions, but from those only. Additions to the class of appealable interlocutory orders were made from time to time until the enactment of § 1292 in its present form. No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.

348 U.S. at 180-81 (footnotes omitted). The Court remarked that the further enlargement of interlocutory appellate jurisdiction should be left to Congress which "is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants." *Id.* at 181.

In *Stringfellow* v. *Concerned Neighbors in Action*, — U.S. —, 107 S. Ct. 1177, 1184 (1987), this Court reiterated the importance of the final judgment rule in protect-

ing "a variety of interests that contribute to the efficiency of the legal system":

> Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. [368,] 374, 101 S. Ct. [669,] 673 [(1981)]. Particularly in a complex case such as this, a district judge's decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference. . . . The judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review.

It was for these very reasons that Congress enacted Rule 54(b) of the Federal Rules of Civil Procedure, entrusting to the district court—the court better equipped to determine the need for interlocutory review—that determination. *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8-11 (1980) (determination of Rule 54(b) certification is commended to the sound discretion of the district court and should be reversed only if clearly unreasonable). Under Rule 54(b), the district court may direct the entry of final judgment and certify an immediate appeal of what would otherwise be an unappealable interlocutory order, upon the determination that "there is no just reason for delay." [10]

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[10] In the present case, respondents initially did not seek the entry of final judgment under Rule 54(b), but proceeded to appeal the

*(footnote continued on following page)*

The Second Circuit's decision in this case reverses the basic presumption against interlocutory appeals. By permitting review of *every* interlocutory order that dismisses a claim which requests permanent injunctive relief, the Second Circuit contravenes the express Congressional rejection of piecemeal review set forth in section 1292(a)(1) and this Court's interpretation of that statutory provision in *Carson*. The Second Circuit's decision also eschews reliance on the Rule 54(b) certification procedure, expressing disdain rather than "great deference" for the district courts' trial management skills. *See Stringfellow* v. *Concerned Neighbors in Action*, 107 S. Ct. at 1184. This judicial modification of statutory authority favoring finality requires review and reversal.

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*(footnote continued from preceding page)*

non-final Order alleging jurisdiction under section 1292(a)(1). Subsequently, respondents made an oral request for a Rule 54(b) finding on September 29, 1987, without attempting to develop any factual record of harm. The district court denied that request.

## CONCLUSION

For all the foregoing reasons, petitioners respectfully request that this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 6, 1988

Respectfully submitted,

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# APPENDIX

**Opinion of the Court of Appeals**
**February 8, 1988**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term, 1987

(Argued: October 20, 1987 Decided: February 8, 1988)
Docket Nos. 87-7776, 87-7778, 87-7784

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VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION and PROSERV, INC.,

*Plaintiffs-Appellants,*

—against—

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER, III and PHILIPPE CHATRIER,

*Defendants-Appellees.*

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MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL and M. MARSHALL HAPPER, III,

*Counterclaimants,*

—against—

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION and PROSERV, INC.,

*Counterclaim-Defendants,*

—and—

DONALD L. DELL, RAYMOND S. BENTON, DELL, BENTON & FALK, MARK H. MCCORMACK, INTERNATIONAL MERCHANDISING GROUP, INTERNATIONAL MANAGEMENT INC., TRANSWORLD INTERNATIONAL INC., and A.B. VOLVO,

*Additional Counterclaim-Defendants.*

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*Opinion of the Court of Appeals—February 8, 1988*

Before:

OAKES, CARDAMORE, and MAHONEY,

*Circuit Judges.*

Motion to dismiss consolidated appeals from an order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, which dismissed a thirteen count complaint seeking damages and injunctive relief, and denied leave to replead counts one through seven and thirteen thereof (which counts encompassed all claims of alleged antitrust violations). Movants contend that the dismissal below does not constitute the refusal of an injunction, and therefore this court lacks jurisdiction over the appeal under 28 U.S.C. § 1292(a)(1) (1982), which provides for appeal as of right from interlocutory orders refusing injunctions.

Motion granted as to counts eight through twelve, which were dismissed with leave to replead, as well as count thirteen, which does not seek injunctive relief, and denied as to counts one through seven, which seek injunctive relief and were dismissed without leave to replead.

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ROBERT S. LITT, Washington, D.C. (Williams & Connolly, Mark S. Levinstein, William R. Murray, Jr., Washington, D.C., of counsel), *for Plaintiff-Appellant ProServ, Inc.*

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MAHONEY, *Circuit Judge*:

Defendants-appellees, Men's International Professional Tennis Council, M. Marshall Happer, III and Phillippe Chatrier (collectively "MIPTC"), move to dismiss the consolidated appeals of plaintiffs-appellants Volvo North America Corporation ("Volvo"), International Merchandising Corporation ("IMC") and ProServ, Inc. ("ProServ") for lack of jurisdiction over the appeals. The appeals were taken from a memorandum and order of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge,* entered August 10, 1987, which dismissed, pursuant to Fed. R. Civ. P. 12(b)(6),[1] plaintiffs-appellants' thirteen count amended complaint alleging various antitrust violations injuring all plaintiffs-appellants, and various contractual and related violations injuring Volvo alone, and requesting damages and injunctive relief relating to various practices in which MIPTC allegedly engages with respect to its conduct and

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[1] The district court's memorandum and order from which this appeal is taken described the motion on which that court ruled at several places as one for summary judgment, but this appears to have been simply a misnomer for a Rule 12(b)(6) motion.

promotion of the Grand Prix Circuit ("Grand Prix"), a series of men's professional tennis tournaments.

Specifically, counts one through seven and thirteen were dismissed without leave to replead, and are those primarily at issue on this appeal. The action below remains open pending the determination of counterclaims (as well, of course, as any of counts eight through twelve of the dismissed complaint that may be repleaded). Judge Duffy declined to enter any final judgment pursuant to Fed. R. Civ. P. 54(b), so appellate jurisdiction will not lie under 28 U.S.C. § 1291 (1982). MIPTC contends that the dismissal of the amended complaint does not constitute the refusal of an injunction, and thus that there is also no jurisdiction over the appeals under 28 U.S.C. § 1292(a)(1) (1982), which provides for immediate appeal of interlocutory orders that grant, continue, modify, refuse or dissolve injunctions, or refuse to dissolve or modify them.

We grant the motion to dismiss the appeal as to counts eight through twelve, which were dismissed with leave to replead, as well as count thirteen, which does not seek injunctive relief, and deny the motion as to counts one through seven, which seek injunctive relief and were dismissed without leave to replead.

## Background

This case stems from a dispute between MIPTC, an unincorporated association that, since 1974, has organized and overseen the Grand Prix, and Volvo, which from 1980 through 1984 was the overall sponsor of the Grand Prix. In February, 1984, following contract bids, the MIPTC named Nabisco Brands, Inc. as the 1985 Grand Prix sponsor. Volvo then entered into an agreement with MIPTC

(the "Agreement") whereby Volvo assigned its then existing contracts with NBC and Madison Square Garden to MIPTC in exchange for subsidiary sponsorship of several individual Grand Prix events, and Volvo and MIPTC agreed to cooperate with each other's reasonable promotional activities.

In April, 1985, however, Volvo filed suit against MIPTC over the discontinued sponsorship and subsequent arrangements. In September, 1985, IMC and ProServ, which engage both in the representation of male professional tennis players and the production of men's professional tennis events, were allowed to intervene over the objections of MIPTC, and plaintiffs-appellants were granted leave to file the amended complaint whose dismissal is the subject of this appeal.

Counts one through five of the amended complaint allege various violations of federal antitrust statutes by MIPTC injuring all plaintiffs. The gravaman of the antitrust allegations is that MIPTC controls access to the major men's professional tournaments, and has used this control to impose restrictions upon male professional tennis players which hamper the ability of actual and potential competitors of MIPTC to conduct competiting tennis events. Count six alleges interferences with prospective business relationships, and count seven unfair competition, again injuring all plaintiffs. Treble damages are sought with respect to counts one through five, compensatory and punitive damages are sought with respect to counts six and seven, and declaratory and extensive injunctive relief are sought with respect to all seven counts.

Counts eight through thirteen are alleged only by Volvo, and assert breach of contract (counts eight and ten), fraud (counts nine and eleven), defamation (count twelve) and

product disparagement (count thirteen). Damages are sought with respect to all these counts, as well as limited injunctive relief under counts ten and eleven relating to alleged breaches of the Agreement by MIPTC and related matters.

MIPTC moved to dismiss the amended complaint, and the district court granted that motion by a memorandum and order filed August 10, 1987. Leave to replead was denied with respect to counts one through seven and thirteen, but granted with respect to counts eight through twelve.

Plaintiffs-appellants filed appeals from the order of dismissal on September 8 and 9, 1987. Shortly thereafter, the district court declined to enter any final judgment pursuant to Fed. R. Civ. P. 54(b).[2] MIPTC now moves to dismiss the appeals, claiming that this court lacks jurisdiction over the appeals because they are not taken from a final order pursuant to 28 U.S.C. § 1291 (1982), and also do not qualify under 28 U.S.C. § 1292(a)(1) (1982), which provides for the immediate appeal of interlocutory orders that grant, continue, modify, refuse or dissolve injunctions, or refuse to dissolve or modify them. Plaintiffs-appellants contend that the order dismissing the claims is appealable as of right under 28 U.S.C. § 1292(a)(1)

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[2] A Rule 54(b) certification by Judge Duffy at this juncture would apparently be honored in this circuit, *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283, 285 (2d Cir. 1974); *see also Leonhard v. United States*, 633 F.2d 599, 609-11 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981), although this is not the universal rule. *See, e.g., Kirkland v. J. Ray McDermott & Co.*, 568 F.2d 1166, 1169 (5th Cir. 1978); *Oak Constr. Co. v. Huron Cement Co.*, 475 F.2d 1220, 1221 (6th Cir. 1973) (per curiam). We do not mean to imply by this comment that a post-appeal request for Rule 54(b) certification is generally sound practice.

(1982) because it refuses an injunction within the meaning of that provision.

Discussion

In determining whether this court has jurisdiction over these appeals, we must begin with the statutory provision at issue. 28 U.S.C. § 1292(a)(1)(1982) states in pertinent part:

> § 1292. Interlocutory decisions
> (a) . . . [T]he courts of appeals shall have jurisdiction of appeals from:
> (1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . .

This statute provides an exception to the longstanding rule, codified in 28 U.S.C. § 1291 (1982), that appeals should generally be taken only from a final judgment of a district court. The policy underlying this rule was stated by the Supreme Court in *McLish v. Roff*, 141 U.S. 661 (1891):

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

*Id.* at 665-66 (citation omitted). *See also Stringfellow v. Concerned Neighbors in Action*, — U.S. ——, ——, 107 S. Ct. 1177, 1184 (1987).

The exception for certain appeals from interlocutory orders dealing with injunctions was first introduced in 1891, and has developed over the years into the present enactment codified in 28 U.S.C. § 1292(a)(1) (1982). *See generally Baltimore Contractors v. Bodinger,* 348 U.S. 176, 180 & n.6 (1955) (discussing history of section 1292).

Plaintiffs-appellants contend that the present appeal falls squarely within the terms of section 1292(a)(1). MIPTC contends, on the contrary, that this section has been definitely construed in *Carson v. American Brands, Inc.,* 450 U.S. 79 (1982) (hereinafter *"Carson"*), so as to preclude appellate jurisdiction in the present case.

Before dealing with *Carson,* however, we must consider *General Electric Co. v. Marvel Rare Metals Co.,* 287 U.S. 430 (1932) (hereinafter *"General Electric"*), which is very closely on point. In *General Electric,* a defendant in a patent infringement suit counterclaimed for patent infringement, seeking an injunction and accounting, and the counterclaim was dismissed on plaintiffs' motion for want of personal jurisdiction over the plaintiffs. Defendant appealed, successfully contending in both the Sixth Circuit Court of Appeals and the Supreme Court for the sensible result that plaintiffs could not, under the pertinent statutes and rule, simultaneously invoke the jurisdiction of the district court of the district court as plaintiffs and avoid personal jurisdiction as counterclaim defendants. Preliminarily, however, the Supreme Court had to deal with plaintiffs' claim that appellate jurisdiction was wanting under the terms of the substantially identical predecessor of 28 U.S.C. § 1292(a)(1) (1982). It did so in the following terms:

> [B]y their motion to dismiss, plaintiffs themselves brought on for hearing the very question that,

> among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer.

*General Electric*, 287 U.S. at 433.

In *Carson*, however, the Supreme Court, in reviewing a district court's order denying a motion to enter a consent decree which included injunctive provisions, announced this rule:

> For an interlocutory order to be immediately appealable under § 1292(a)(1), . . . a litigant must show more than that the order has the *practical effect* of refusing an injunction . . . . Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

*Carson*, 450 U.S. at 78 (emphasis added) (quoting *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955)).[3]

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[3] The rule stated in *Carson* was recently reiterated by the Supreme Court, without significant elaboration, in *Stringefellow v. Concerned Neighbors in Action*, —— U.S. ——, 107 S. Ct. 1177 (1987), where an appeal from an order conditioning intervention was dismissed, applying the *Carson* criteria.

In reviewing the Supreme Court's prior precedents on this subject, the *Carson* court addressed *General Electric* as follows:

> *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932), a case in which respondents sought to appeal the District Court's dismissal of their counterclaim for injunctive relief on jurisdictional grounds, concluded that the District Court's order *did* have a serious, perhaps irreparable, consequence and that it could not be effectually challenged unless an appeal were immediately taken. The Court noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction," *id.*, at 433, 53 S. Ct., at 204, and that this decision resolved "the very question presented to the court upon formal application for an interlocutory injunction." *Ibid.*

*Carson*, 450 U.S. at 86 n.11 (emphasis in original).

Plaintiffs-appellants contend that (1) *Carson* applies only with respect to interlocutory orders which have the "practical effect" of refusing an injunction, while the final dismissal here constitutes an explicit refusal of an injunction governed by *General Electric*, to which *Carson* is simply inapplicable; and in any event, (2) they have met the requirements of *Carson* because the district court's final dismissal of the antitrust counts of their complaint is of "serious, perhaps irreparable consequence" and can be "effectually challenged" only by immediate appeal.

MIPTC contends that (1) the rule stated in *Carson* applies to all interlocutory orders which refuse an injunction; (2) alternatively, the final dismissal here does not

directly rule on an application for an injunction, and must therefore be tested under the "practical effect" rule of *Carson* requiring serious or irreparable consequences which can only be challenged by immediate appeal; and in either event, (3) plaintiffs-appellants have not satisfied the *Carson* test.

For the reasons hereinafter stated, we conclude that the ruling below did not explicitly refuse an injunction, and must therefore be tested under the *Carson* "practical effect" analysis,[4] but plaintiffs-appellants have succeeded in establishing that the dismissal from which they appeal is of "serious, perhaps, irreparable consequence" and can be "effectually challenged" only by immediate appeal.

*Carson* has spawned an array of circuit court opinions which have attempted to cope with its implications. The post-*Carson* cases in this circuit construing section 1292(a)(1) are not particularly helpful to the resolution of the issue which we must address. *H&S Plumbing Supplies, Inc. v. BancAmerica Commercial Corp.*, 830 F.2d 4, 7 (2d Cir. 1987), saw no irreparable consequences resulting from a refusal to cancel a lis pendens pending resolution of the underlying litigation. *Korea Shipping Corp. v. New York Shipping Ass'n*, 811 F.2d 124 (2d Cir. 1987), held that an order requiring the continuation of payments to a pension benefit plan pending the adjudication of a party's continuing obligations respecting that plan had the "practical effect" of a preliminary injunction, but did not meet the *Carson* test for appellate jurisdiction. *United States v. Caparros*, 800 F.2d 23, 26 (2d Cir. 1986), held that an interlocutory protective order precluding defendant from publicizing

[4] It is therefore unnecessary to determine in this opinion whether *Carson* applies to all interlocutory orders which refuse an injunction.

documents provided for him by the government threatened no irreparable harm warranting appellate jurisdiction.

*General Motors Corp. v. Gibson Chemical & Oil Corp.*, 786 F.2d 105, 107-08 (2d Cir. 1986), deemed the interlocutory grant of a preliminary injunction to plaintiff "which touches upon the merits of [plaintiff's] claim" immediately appealable, but deemed a seizure order not to meet the requirements of *Carson*. *In Re Feit & Drexler, Inc.*, 760 F.2d 406, 411-13 (2d Cir. 1985), held that an interlocutory order restraining a defendant from disposing of any of her property and directing delivery of all her property to her attorney in escrow *pendente lite* met the *Carson* test for immediate appeal. *Bridge C.A.T. Scan Associates v. Technicare Corp.*, 710 F.2d 940 (2d Cir. 1983), declined section 1292(a)(1) jurisdiction over an appeal from an interlocutory order regulating disclosure without citing *Carson*. *New York v. Dairylea Coop, Inc.* 698 F.2d 567 (2d Cir. 1983), deemed an interlocutory appeal from a district court's refusal to sanction a proposed settlement agreement not to meet the requirements of *Carson*.

*General Motors* comes closest to our case, in its assertion that the grant of a preliminary injunction to plaintiff "which touches upon the merits of [plaintiff's] claim is, of course, reviewable." 786 F.2d at 108 (citation omitted). Some of the cases construing *Carson* have ruled that where an order directly addresses the merits, as Judge Duffy's order here surely did, an appeal may be taken without regard to considerations of irreparable harm. *See e.g., Winterland Concessions Co. v. Trela*, 735 F.2d 257, 261 (7th Cir. 1984) (order dismissing counterclaims which sought injunctive relief appealable without consideration of irreparable harm); *Center for Nat'l Sec. Studies v. C.I.A.*, 711

F.2d 409, 412 (D.C. Cir. 1983) (order granting summary judgment as to count of complaint appealable without consideration of irreparable harm). *See also Tokarcik v. Forest Hills School Dist.*, 665 F.2d 443, 447 (3d Cir. 1981) (order granting summary judgment to plaintiff including injunctive relief "which went to the merits of the dispute" deemed appealable, but defendant's claim of irreparable harm considered). *Cf. Center for Nat'l Sec. Studies* v. *C.I.A.*, 711 F.2d at 412-13 (stating rule that an order directly addressing merits is appealable without a showing of irreparable harm, but applying *Carson* requirements and denying jurisdiction because merits of only one of plaintiff's twelve claims were assessed below).

*General Motors* is not dispositive here, however, because that case involved a straightforward grant of a motion for a *preliminary* injunction, whereas here we have an order which does not respond to a specific application for injunction relief, but rather grants summary judgment which has the "practical effect" of definitively denying the permanent injunctive relief sought by plaintiffs-appellants with respect to their antitrust claims (since leave to replead was denied as to those claims). A number of cases have stated that appeal under section 1292(a)(1) is more appropriate with respect to preliminary than to permanent injunctive relief. *See e.g., Woodard v. Sage*, 818 F.2d 841, 851 (Fed. Cir. 1987) (in banc) (denial of preliminary injunction cannot effectively be reviewed after trial, but denial of permanent injunction does not necessarily have this element of harm); *Shanks v. Dallas*, 752 F.2d 1092, 1097 & n.6 (5th Cir. 1985) (denial of permanent injunction usually carries a lesser threat of irreparable harm since full injunctive relief can be granted on appeal); *Shirey v. Bensalemn Township*, 663 F.2d 472, 476 (3d Cir. 1981) (primary use of section

1292(a)(1) has been for appellate review of decisions on preliminary injunctions).

We note also that some of the cases assert that a failure to pursue preliminary injunctive relief, as occurred here, militates against interlocutory appellate review. *See, e.g., South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 394 (7th Cir. 1984); *Shirey v. Bensalem Township*, 663 F.2d 472, 476-77 (3d Cir. 1981). *But see Brown v. Kerr- McGee Chemical Corp.*, 767 F.2d 1234, 1240 (7th Cir. 1985), *cert. denied*, 475 U.S. 1066 (1986) (failure to seek preliminary injunctive relief held not to bar plaintiff from seeking appellate relief from interlocutory order granting partial summary judgment to defendant where preliminary relief impractical). Plaintiffs-appellants contend that the initiation of this litigation had the effect of deterring MIPTC from pursuing the activities which threatened harm to plaintiffs-appellants, so the necessary showing of imminent harm could not have been made in support of an application for a preliminary injunction. On this record, we cannot conclude that plaintiffs-appellants' failure to seek preliminary injunctive relief below should bar this appeal.

We thus return to the applicability of *General Electric*, and the impact of *Carson* on *General Electric*. In the first place, we would agree that since *General Electric* (and this appeal) did not involve the grant or denial of a motion specifically addressed to injunctive relief, it is a case where the "practical effect" of the order was to refuse an injunction within the meaning of *Carson*. *Carson*, 450 U.S. at 84. *See also Woodard v. Sage*, 818 F.2d 841, 845 (Fed. Cir. 1987) (in banc); *Brown v. Kerr-McGee Chemical Corp.*, 767 F.2d 1234, 1237 (7th Cir. 1985); *In Re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1133 (9th Cir.

1984), *cert. denied,* 469 U.S. 1207 (1985); *Center for Nat'l Sec. Studies v. C.I.A.,* 711 F.2d 409, 412 (D.C. Cir. 1983). Thus, cases factually similar to *General Electric,* such as the instant appeal, would be subjected to the *Carson* requirements.

This is perhaps another way of arriving at the view expressed in *Woodard v. Sage,* 818 F.2d 841, 851 (Fed. Cir. 1987) (in banc), that *Carson* "clarif[ied *General Electric*] by stating a requirement that was met but not discussed" in *General Electric.* The precise terms of that clarification, however, are crucial to the resolution of the issue before this court. *Carson* stated that *General Electric* did in fact find irreparable harm resulting from an order that could not be effectually challenged unless immediate appeal was allowed, because:

> The Court [in General Electric] noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendant[s] were not entitled to an injunction," *id.* [*i.e.,* 287 U.S.], at 433, 53 S. Ct., at 204, and that this decision "resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." [5]

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[5] We note that the concluding portion of this *Carson* quotation from *General Electric* lends further support to our conclusion that a section 1292(a)(1) appeal should not be denied here because of plaintiffs-appellants' failure to seek preliminary injunctive relief below. In *General Electric,* as here, no application for preliminary injunctive relief had been made by the parties whose claim was dismissed on motion, but the Supreme Court simply observed that the same question was presented by the motion to dismiss that would have been presented had the counterclaimants moved for a preliminary injunction.

Carson, 450 U.S. at 86 n.11 (quoting *General Electric*). *See also Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 481 (1978): "In [*General Electric*] the Court held that an order dismissing a counterclaim for an injunction was appealable. The order, therefore, entirely disposed of the defendant's prayer for injunctive relief . . . ."

So here. The dismissal of the antitrust counts of plaintiffs-appellants' amended complaint without leave to replead decided that, in *Carson's* words (quoting *General Electric*), "upon the facts alleged [in their amended complaint, plaintiffs-appellants] were not entitled to an injunction," and "resolved the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." Or as *Gardner* put it, "[t]he order . . . entirely disposed of the [plaintiffs-appellants'] prayer for injunctive relief." Accordingly, the irreparable harm which *Carson* found in *General Electric* is present here.

This conclusion is fortified by consideration of the affidavits which plaintiffs-appellants have submitted in opposition to this motion. Plaintiffs-appellants assert, inter alia, that MIPTC has refused to renew the sanction for a Chicago tournament which Volvo has conducted in the past, and has adopted new rules which preclude any tournament to be part of the Grand Prix if an entity which represents players owns, has an equity interest in, or manages the tournament. IMC and ProServ are thus situated, both representing male professional tennis players and owning, having an equity interest in or managing tennis tournaments.

In view of the pervasive influence of MIPTC over men's professional tennis tournaments, plaintiffs-appellants argue convincingly that if review of their dismissed antitrust

claims is deferred until the conclusion of the potentially protracted litigation pending below, these restrictions are likely to have a serious and irreparable impact upon their ability to compete with MIPTC in the conduct of men's professional tennis tournaments, and that the order dismissing their antitrust claims can therefore be effectually challenged only by an immediate appeal. Not only, therefore, are the general standards articulated in *General Electric* and reiterated in *Carson* met here; there is also a persuasive showing of specific and irreparable harm which will result from a failure to exercise appellate jurisdiction at this juncture, which is likely to render ineffectual any relief that might result from an appeal from a final judgment in the litigation pending below.

We note that the decision below did not dispose of all of plaintiffs-appellants' claims for injunctive relief, since leave to replead was afforded as to counts ten and eleven, with respect to which Volvo (but not the other plaintiffs-appellants) sought relatively limited injunctive relief relating primarily to the Agreement. As in *Build of Buffalo, Inc. v. Sedita*, 441 F.2d 283 (2d Cir. 1971), however, the severe limitation of the injunctive relief sought suffices for appellate jurisdiction. *See Winterland Concessions Co. v. Trela*, 735 F.2d 257, 261 (7th Cir. 1984) (citing *Build of Buffalo* for this rule). *Contrast Western Geophysical Co. v. Bolt*, 440 F.2d 765, 771 (2d Cir. 1971) (no appellate jurisdiction where partial summary judgment dismissed portion of a counterclaim, but equivalent injunctive relief available under remaining counterclaims).

In this connection, we do not believe that pendent appellate jurisdiction should be extended to the claims for injunctive relief stated with respect to counts ten and

eleven, as to which leave to replead was granted,[6] in view of the disparity between Volvo's individual, essentially contractual claims stated in those counts and the broader antitrust claims stated by all plaintiffs-appellants in counts one through seven. *Cf. United States v. Ianniello,* 824 F.2d 203, 209 (2d Cir. 1987) (pendent appellate jurisdiction appropriate where issues intertwined).

Finally, we note that the panel which hears this appeal on the merits may wish to consider the views concerning the scope of such appeals expressed in *Cable Holdings of Battlefield, Inc. v. Cooke,* 764 F.2d 1466, 1472 (11th Cir. 1985).[7]

## Conclusion

The motion to dismiss the appeal is granted as to counts eight through thirteen of plaintiffs-appellants' amended complaint, and denied as to counts one through seven thereof.

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[6] An appropriate analogy may be provided by *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.,* 385 U.S. 23 (1966), which dismissed an appeal from an order which denied, because of unresolved issues of fact, a motion for summary judgment which sought injunctive relief "lest a floodgate be opened that brings into the exception [provided by section 1292(a)(1)] many pretrial orders." *Id.* at 24-25. Since the case is not before us, we intimate no view as to the appropriate rule where leave to replead is granted but the litigant elects to stand on his pleading. *See Electronic Switching Indus., Inc. v. Faradyne Electronics Corp.,* 833 F.2d 418 (2d Cir. 1987); *Borelli v. Reading,* 532 F.2d 950 (3d Cir. 1976).

[7] We also note *Cable Holdings'* admonition, 764 F.2d at 1472, that "we should not encourage the practice of appending perfunctory requests for injunctive relief to complaints as a device to secure immediate appeal of all orders," an admonition which we are confident this court would enforce in an appropriate case.